University of Michigan Journal of Law Reform

Volume 15

1982

Legitimacy in Social Reform Litigation: An Empirical Study

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LEGITIMACY IN SOCIAL REFORM LITIGATION: AN EMPIRICAL STUDY

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Modern American society has experienced an increased emphasis upon judicial intervention as a mechanism for social reform.[1] Starting with the desegregation cases, advocates seeking social change on behalf of ethnic minorities,[2] prisoners[3] and mental patients,[4] welfare recipients,[5] women,[6] and numerous other disadvantaged groups have pursued litigation, particularly constitutional litigation in the federal courts, as the best means for achieving their goals.[7] Each victory has triggered countless

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1. *See* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 18 (1979) ("the focus of structural reform is not upon particular incidents or transactions, but rather upon the conditions of social life and the role that large-scale organizations play in determining those conditions"); Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Actions Problem,"* 92 HARV. L. REV. 664, 668-76 (1979).

2. *See, e.g.*, Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (seeking rezoning of land to permit the construction of racially integrated housing); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (attacking the state system of financing public education as discrimination against the poor and minority groups).

3. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979) (challenging conditions of confinement and various practices in facility housing pretrial detainees); Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980) (finding conditions in county jail to be unconstitutional in several respects).

4. *See, e.g.*, Parham v. J.R., 442 U.S. 584 (1979) (seeking declaratory judgment that procedures for voluntary commitment of juveniles to state mental hospitals contravened the fourteenth amendment); Mills v. Rogers, 102 S. Ct. 2442 (1982) (attack upon state mental institution policies regarding the medication and seclusion of patients).

5. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (finding constitutional infirmities in the procedures employed for terminating welfare benefits); Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that a one-year residency requirement utilized by several states to limit welfare benefits was unconstitutional).

6. *See, e.g.*, Maher v. Roe, 432 U.S. 464 (1977) (urging that state should be constitutionally obligated to fund nontherapeutic abortions); Geduldig v. Aiello, 417 U.S. 484 (1974) (challenging state disability insurance program which excluded pregnancy benefits from the scope of its coverage).

7. *See* Statement of Dr. Martin Luther King, Jr., *et al* (April 11, 1963), *reprinted in* Walker v. City of Birmingham, 388 U.S. 307, 323-24 (1967); Neuborne, *The Myth of*

new claims, resulting in an "explosion" of judicially discovered rights and proceedings to enforce them.[8]

This expanded judicial involvement has created intensified opposition to social reform litigation.[9] Attorneys in these cases have been suspected of pursuing their own agenda for social reform rather than the specific interests of their clients. If this indeed is the case, then individual disputes that could be informally resolved may instead become formal lawsuits, thus polarizing disputants' positions and requiring a judge to decide social issues.

Moreover, in many instances substantial resistance has developed to implementation of court-ordered remedies. Thus, parents have kept their children home rather than sending them to desegregated schools,[10] and staffs in prisons and mental hospitals have threatened to strike when confronted with judicial decrees mandating changes in institutional operations.[11] The most problematic resistance, however, lies not in these incidents of open defiance, which can readily be identified and addressed by traditional police measures or contempt proceedings.[12] Rather, the more fundamental obstacle to social reform litigation is the quiet resistance at the bottom of bureaucracies: from the teacher

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Parity, 90 HARV. L. REV. 1105, 1115-16 (1977).

8. *See* Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1008-10 (1970).

9. *See, e.g.*, A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

10. For example, the order to desegregate the Boston Public Schools in Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), met with violent resistance. *See* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482 (1976). *See generally* Comment, *Community Resistance to School Desegregation: Enjoining the Undefinable Class*, 44 U. CHI. L. REV. 111 (1976).

11. *See, e.g.*, Affidavits in Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part and rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom.* Mills v. Rogers, 102 S. Ct. 2442 (1982) (on file with the *Journal of Law Reform*).

12. Judges often are reluctant to use contempt power, perhaps because they think the public does not fully support the legitimacy of the underlying order. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 306 F. Supp. 1299, 1314 (W.D.N.C. 1969) (school discrimination case), *aff'd in part*, 431 F.2d 138 (4th Cir. 1970), *aff'd in part and rev'd in part*, 402 U.S. 1 (1971) (affirming district court). Despite repeated orders, *see* 300 F. Supp. 1358 (W.D.N.C. 1969) (order of Apr. 23); *id.* at 1381 (order of June 20); 306 F. Supp. 1291 (W.D.N.C. 1969) (order of Aug. 15), the defendant school board failed to submit and implement a satisfactory school desegregation plan. When, on November 17, 1969, the board failed to comply with still another deadline, the plaintiffs moved for contempt citations against members of the board. Though admitting that the "evidence might very well support such citations," 306 F. Supp. at 1314, the court deferred action, stating that contempt citations would be avoided if possible. *See also* Interview with M. Davidson, in M. MELTSNER & P. SCHRAG, PUBLIC INTEREST ADVOCACY 257, 258 (1974).

in the classroom, the prison guard in the cellblock, or the attendant in the mental ward—people harboring deep-seated resentment and hostility that cannot be changed by contempt proceedings but which nonetheless will quite effectively sabotage a court's remedial program.

This Article undertakes a detailed examination of a single lawsuit, *Martin Luther King Junior Elementary School Children v. Ann Arbor School District Board.*[13] This study first explores the diversity of interests present among both the plaintiff and defendant groups in *King*, and analyzes the performance of the attorneys in representing these interests. The Article then turns to the problems of resistance that arise at the decree stage in social reform litigation, and presents an empirical evaluation of the factors influencing the response to judicially mandated relief.

In many ways, *King* is typical of social reform litigation. The plaintiffs were a large, heterogeneous group with personal grievances that were changed and expanded when translated into legal claims by attorneys cooperating with a social reform organization. The result was a lawsuit seeking affirmative injunctive relief from a defendant bureaucracy having varied levels of authority and responsibility. Careful study of this litigation demonstrates that lawyers pursuing social reform often must choose a focus from among the variety of interests contained within their complex client entity, including both formal parties and informal allies. This process can result in litigation focusing on issues only vaguely related to the real conflict between the parties. The study also indicates the necessity for courts to fashion relief in a manner calculated to encourage direct, personal participation by those individuals involved in implementing the remedial plan.

I. THE ANN ARBOR BLACK ENGLISH CASE

In *Martin Luther King Junior Elementary School Children v. Ann Arbor School District Board,*[14] presiding Judge Charles Joiner confronted what he fully recognized to be social reform

13. 473 F. Supp. 1371 (E.D. Mich. 1979). Earlier opinions in the case are at Martin Luther King Junior Elementary School Children v. Michigan Bd. of Educ., 451 F. Supp. 1324 (E.D. Mich. 1978) (dismissing portions of the complaint), and Martin Luther King Junior Elementary School Children v. Michigan Bd. of Educ., 463 F. Supp. 1027 (E.D. Mich. 1978) (conditionally dismissing amended complaint).

14. 473 F. Supp. 1371.

litigation having potentially national impact. Plaintiffs, children enrolled in the Martin Luther King Junior Elementary School in Ann Arbor, had advanced arguments raising "one of the most important and pervasive problems facing modern urban America—the problem of why 'Johnnie Can't Read' when Johnnie is black and comes from a scatter low income housing unit . . . in an upper middle class area of one of America's most liberal and forward-looking cities."[15] Finding black English to be a recognized language system different in many respects from standard English,[16] Judge Joiner concluded that the failure of the defendant Ann Arbor school system to take specific action to overcome the language difficulties facing the plaintiff black-English-speaking children constituted a denial of their rights under the Equal Educational Opportunities Act of 1974.[17]

Teachers in the Ann Arbor school system had not been trained either to recognize the rules of black English or to teach children to "code switch"[18] from black to standard English; this deficiency in training, the court felt, might have caused teachers to consider black English as incorrect, ungrammatical, and erroneous—and to perceive students using the dialect as inferior.[19] At the very least, the court concluded, the teachers' lack of

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15. *Id.* at 1381; *see id.* at 1373 ("This action is a cry for judicial help in opening the doors to the establishment. Plaintiffs' counsel says that it is an action to keep another generation from becoming functionally illiterate.").

16. *Id.* at 1382. "Standard" English refers to "that form of English used by relatively well-educated, middle-class Americans . . . [and] is considered to be standard simply because of its widespread use." van Geel, *The Right to be Taught Standard English: Exploring the Implications of* Lau v. Nichols *for Black Americans*, 25 SYRACUSE L. REV. 863, 863 n.2 (1974). Black English is one of many English dialects. *See* J. FALK, LINGUISTICS AND LANGUAGE 287 (1978).

The *King* court relied heavily upon the conclusions of expert linguists that black English represents a cohesive language system with definite rules of grammar, syntax, and pronunciation used primarily by black Americans in informal communications. 473 F. Supp. at 1375-76. *See generally* R. BURLING, ENGLISH IN BLACK AND WHITE (1973); J. DILLARD, BLACK ENGLISH (1972); E. FOLB, RUNNIN' DOWN SOME LINES: THE LANGUAGE AND CULTURE OF BLACK TEENAGERS (1980); G. SMITHERMAN, TALKIN AND TESTIFYIN (1977). Indeed, the court found that the plaintiffs spoke black English at home and in their community, although they could speak and understand standard English and usually did so in school. 473 F. Supp. at 1379.

17. The Act provides in part: "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by— . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f) (1976).

18. "Code switching" denotes the interpretive process employed when black-English-speaking children shift to the use of standard English. In effect, black-English-speaking children can become bilingual, using their dialect at home and in their community while becoming fluent in standard English as well. *See* 473 F. Supp. at 1376.

19. *Id.* at 1377.

knowledge and expertise would hamper even sincere efforts to teach black-English-speaking children to read.[20] Therefore, the court determined that a "language barrier" existed, impeding equal educational participation for black-English-speaking children.[21] Although the defendant school system had no intent or purpose to discriminate against black children, its failure to pursue special steps for dealing with the black English problem "impact[ed] on race,"[22] in violation of the federal statute.[23] To remedy the school system's failure to address the special needs of black-English-speaking students, Judge Joiner ordered that the Ann Arbor School Board adopt measures that (1) would educate its teachers regarding black English, and (2) would enhance the teaching of reading to black-English-speaking children at the King School.[24]

A. Evolution of the Lawsuit

Judge Joiner had thus embarked upon a novel course[25] designed to address educational difficulties confronting black-English-speaking children. Seemingly, social reform through litigation had succeeded; the plaintiffs had secured redress through the courts for their grievances about public school policy.[26] Yet a very different picture of the lawsuit emerges upon examination of the forces—often more complex than the case would indicate—that initially induced the plaintiffs to seek recourse through the courts. Indeed, the incidents and concerns that

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20. *Id.* at 1379.

21. *Id.* at 1375-76. The court noted that this language barrier may engender even greater discrimination than that faced by the monolingual foreign child, because foreign languages are not stigmatized as inferior. *Id.* at 1376.

22. *Id.* at 1382.

23. 20 U.S.C. § 1703(f) (1976); *see supra* note 17 and accompanying text.

24. 473 F. Supp. at 1383-84. For discussions focusing upon the court's finding of legal liability, see Comment, *Judicial Recognition of Black English as a Language Barrier Under the Equal Educational Opportunities Act*, 65 IOWA L. REV. 1445 (1980); Note, *Black English and Equal Educational Opportunity*, 79 MICH. L. REV. 279 (1980); Casenote, *Constitutional Law—Equal Educational Opportunity—Failure to Consider Black English in Reading Instruction*, 26 WAYNE L. REV. 1091 (1980); Comment, Martin Luther King Junior Elementary School Children v. Michigan Board of Education: *Extension of EEOA Protection to Black-English-Speaking Students*, 22 WM. & MARY L. REV. 161 (1980).

25. *See* Note, *Black English and Equal Educational Opportunity*, *supra* note 24, at 297-98 (arguing that the significance of Judge Joiner's opinion "lies not in the remedy the court ordered, but in the nature of the language barrier it recognized").

26. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976) (social reform litigation addresses "grievance[s] about the operation of public policy").

sparked a lawsuit and led eventually to the decree in *King* bore little or no relation to the school system's approach toward black English.

1. The Green Road Housing Project and the King School— The Martin Luther King Junior Elementary School is located in a relatively affluent, predominantly white neighborhood of Ann Arbor, Michigan.[27] An academic and professional community, home of the University of Michigan, Ann Arbor boasts a high concentration of intellectually gifted children and an excellent public school system.

With an eye toward avoiding racial or economic segregation, Ann Arbor has built low-income, subsidized housing in small units scattered throughout various parts of the city. Children from one of these developments, the Green Road Housing Project, attend the King School. The friction between the Green Road parents and children, almost all of whom are black and low-income,[28] and the white, middle-class-oriented King School created the initial discontent that was eventually molded into the *King* litigation.[29]

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27. 473 F. Supp. 1374, 1381.

28. Complaint at 10, Martin Luther King Junior Elementary School Children v. Ann Arbor School Dist. Bd., 473 F. Supp. 1371 (E.D. Mich. 1979).

29. Two stories typify the relations between the King School and the Green Road families. The first concerns transportation for the Green Road schoolchildren. The housing project lies 1.2 miles from the school, just under the 1.5 mile radius that makes children eligible for bussing. The mothers felt this to be too long a walk for younger children, and demanded a bus. Meanwhile, the school was receiving complaints from residents of the modern, affluent white neighborhood surrounding the King School about Green Road children "cutting through" yards. The school district responded to this pressure by providing a bus financed by Human Relations funds.

When children began misbehaving on the bus, the school held one meeting with Green Road families to discuss this problem; no mechanism for continued parental involvement was developed. After an incident between Green Road children and an aide who supervised the children while they waited for the bus, angry Green Road parents and an attorney arrived at the school and confronted the principal. The school called the police and had the parents removed; subsequently, funds for the bus evaporated.

The provision of lunches for the Green Road children provides a second example of the tensions existing between the housing project and the school. The Green Road children had to stay at school during lunch because they lived too far away to walk home and back during the allotted time. Yet they often arrived at school without any lunch, and King School, with its small proportion of low-income students, did not qualify for federal funds and thus had no lunch program. *Id.* at 9, 12. To resolve the problem, the Parent-Teacher Organization ("PTO") eventually agreed to provide peanut butter and jelly sandwiches. Unwilling to let the children make their own sandwiches, however, the PTO prepared and froze the food. Often the sandwiches were not taken out of the freezer before lunch, though, so the children ate frozen sandwiches. (These stories, and much of the background information about the litigation, were obtained from interviews with Ruth Zweifler of the Student Advocacy Center, three out of four of the plaintiffs' mothers, and several of the plaintiff schoolchildren.)

The children from the Green Road Project felt they were perceived by their teachers and classmates as a group—"the Green Road kids"—rather than as individuals. They felt the teachers consistently blamed them for trouble they did not cause and kept them under constant scrutiny. According to the Green Road children, behavior tolerated in others resulted in discipline for them. Likewise, the Green Road parents felt the school to be "closed" to them—that it resisted rather than sought their involvement, and that it perceived their complaints as attacks to be repulsed.

Aside from the sense that their participation in the school had been rejected, the Green Road parents were concerned with the apparent failure of their children to advance and learn in school. Their children were labelled "learning disabled" or "emotionally impaired," and so received special help,[30] but still seemed not to be learning.[31] The parents felt their children had normal intelligence for their socioeconomic group and considered the labels affixed by the school to be stigmatizing and misleading. The school administration appeared to refuse responsibility for this slow progess, and blamed the children and parents for the problem. The parents felt distant and uninformed, unable to obtain satisfactory answers about their children's difficulties.

2. Translation of the grievances into a lawsuit—From this atmosphere of alienation and disaffection grew a landmark legal ruling on the almost unrelated subject of a "language barrier" under the Equal Educational Opportunities Act. The catalyst for this conversion was Ruth Zweifler of the Student Advocacy Center, an Ann Arbor organization devoted to advancing students' interests in the schools. Zweifler became heavily involved with the problems of the Green Road children, representing them at meetings of the Educational Planning and Placement Committee, which determined whether students were learning disabled or emotionally impaired.[32] She argued that the

30. Michigan law requires school systems to give appropriate special help to children determined by an Educational Planning and Placement Committee to be "handicapped." Two categories of "handicapped" children are "learning disabled" and "emotionally impaired." MICH. ADMIN. CODE R. 340.1702, .1703, .1721 (1979). *See generally* Abrams & Abrams, *Legal Obligations Toward the Post-Secondary Learning Disabled Student*, 27 WAYNE L. REV. 1475 (1981).

31. 473 F. Supp. at 1380.

32. Children experiencing learning difficulties are usually referred by their teachers to the District Special Services Department for a comprehensive evaluation. Following the evaluation, an Educational Planning and Placement Committee meeting is held to recommend a course of action. Regulations promulgated by the State Department of Education, MICH. ADMIN. CODE R. 340.1701(4) (1979), require that a representative of the administration, instructional personnel, diagnostic personnel, and the parents of the

problems of the Green Road children were not individual but socioeconomic, concluding that the situation demanded solutions more generalized than affixing labels to individual children in order to make special help available.

During the summer of 1977, a series of meetings were held among Zweifler, attorneys Gabe Kaimowitz and Ken Lewis of Michigan Legal Services,[33] and the Green Road parents and children.[34] The parents sought a change not only in the school's behavior, but, more importantly, in its attitude. They wanted their children to be respected by the school as individuals rather than being condemned as a group. They wanted their participation in the school to be welcomed rather than rejected. They wanted the school to accept its responsibility to find an effective way to teach their children.

Litigation was adopted as a strategy for redressing these grievances of the Green Road families. In retrospect, suing the school seems the least effective means for improving the attitude of teachers and administrators. Options other than litigation, however, were not pressed by the advisors from Michigan Legal Services and the Student Advocacy Center—perhaps in part because these advisors had their own interests in pursuing litigation. The Student Advocacy Center desired legitimacy in the eyes of the parents, the school system, and the public as an organization willing to provide powerful advocacy for systemic change; the publicity generated by a federal lawsuit would advance its social reform objectives.[35] The lawyers also sought pub-

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child all be in attendance at the Educational Planning and Placement Committee meeting.

33. The initial connection between the Green Road children and Michigan Legal Services lawyers occurred at the behest of the Student Advocacy Center. Ruth Zweifler arranged for Gabe Kaimowitz of Michigan Legal Services to represent the Green Road parents in a dispute that arose when certain Green Road children were denied their request to transfer from King School to nearby Northside Elementary School. The meeting between school administrators and parents protesting the denial was unproductive, indeed hostile, but the contact with legal counsel had been made.

This mirrored a pattern seen commonly in litigation seeking institutional change. From small welfare rights or prisoners organizations, for example, to the pervasive ACLU or NAACP, social reform organizations often constitute the vehicle that brings lawyers together with individuals who allege a deprivation of their rights.

34. Information about the lawyers' involvement was obtained not only from the interviews listed in note 29 *supra*, but also from interviews with attorneys Ken Lewis of Michigan Legal Services, counsel for plaintiffs, and John Weaver of Butzel, Long, Gust, Klein, and Van Zile, counsel for defendants. Additional information was obtained from an interview with United States District Judge Charles Joiner.

35. Unquestionably, the Student Advocacy Center perceived itself as advancing the interests of the Green Road families as well as its own objectives. Nonetheless, the Center, in common with other social reform organizations, manifested substantial institutional interests in legitimacy and power. *See* Bell, *supra* note 10; Halpern & Cunning-

licity, not only for their office, but more importantly, to expose the failure of middle-class-oriented public education to deal with the problems of poor black children.[36] Subtle negotiation and low-key persuasion, though effective in individual cases, do not generate publicity to the same extent as federal public-interest litigation—publicity that could induce social reforms extending beyond the individual case.

Translating the parents' concerns and goals into legal claims was a formidable task. The lawyers could not argue that inadequacies in the education of Green Road children resulted from racial discrimination alone; a substantial number of middle-class black children attended King School without encountering the difficulties experienced by the Green Road families. The lawyers concluded that the obstacles confronting the Green Road children stemmed from economic, social, and cultural factors: these children lived in a family and neighborhood structure that was poor *and* black.

3. Formulation of the complaint—The Michigan Legal Services lawyers settled upon a complaint stating six claims for relief. The first two causes of action, alleging due process and equal protection violations, focused on the need to provide special services for the Green Road schoolchildren without mislabeling them as emotionally impaired or learning disabled.[37] These claims came closest to the expressed concerns of the Green Road families, and represented the major thrust of the lawsuit.

Yet the complaint also included four other claims that moved farther and farther from the clients' concerns and goals. Only the third cause of action—alleging that the King School had

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ham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805 (1971).

36. Social reform lawyers such as Kaimowitz and Lewis of Michigan Legal Services are willing to accept lower salaries and less prestigious jobs than many attorneys, usually because of their commitment to work for social change. They commonly approach litigation in terms of goals, not clients; indeed, social reform lawyers often perceive the litigation as their own. *See generally* Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970). Clients frequently serve as vehicles for bringing the suit, satisfying the technical requirements of article III, U.S. CONST. art. III, § 2, and enabling the pursuit of reform objectives. In *King*, while the lawyers sincerely felt that they were serving the best interests of their clients, they unquestionably viewed the clients' concerns based upon their own interests, and thus focused on the group harm and the social reform solution rather than on any individual relief.

37. *See* Martin Luther King Junior Elementary School Children v. Michigan Bd. of Educ., 451 F. Supp. 1324, 1327-30 (E.D. Mich. 1978).

failed to take account of the special educational needs of black-English-speaking children[38]—was vindicated ultimately by the court.[39] The fourth claim presented in the complaint alleged racial discrimination: plaintiffs had been deprived of special federal programs aimed at assisting the education of the poor, because the King School did not have a sufficient number of poor children enrolled to qualify for federal funds.[40] The fifth cause of action was a pendent state-law claim, urging that the Green Road children had been denied their right to a free education, guaranteed by the Michigan constitution,[41] because they were not supplied educational materials available in the homes of their classmates.[42] Finally, the complaint sought damages for deprivation of plaintiffs' constitutional rights by various named members of the school administration.[43]

The complaint resulted entirely from decisions made by the lawyers alone. They selected the claims that would be asserted and elected to press all six causes of action in the hope that at least "one would catch." The Green Road parents were not consulted on these tactical choices,[44] even though arguably the addition of counts three through six detracted from the legitimacy of the two causes of action that most clearly stated their grievances. The expanded scope of the complaint perhaps provided an avenue for the court to ignore potentially more vexing claims

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38. *See id.* at 1330-33.

39. *See* Martin Luther King Junior Elementary School Children v. Ann Arbor School Dist. Bd., 473 F. Supp. 1371 (E.D. Mich. 1979).

40. *See* 451 F. Supp. at 1333.

41. MICH. CONST. art. I, § 2.

42. *See* 451 F. Supp. at 1333-34.

43. *See id.* at 1334.

44. Similarly, the Green Road families were not consulted about various procedural matters in the complaint. The lawyers reached a unilateral decision to file the case as a class action, and to include the Student Advocacy Center as "next friend" along with the mothers of the plaintiff schoolchildren. Both these procedural tactics can best be understood from the institutional standpoints of the advisory groups, rather than as a response to the needs of the plaintiffs. Like many public interest litigators, the Michigan Legal Services lawyers routinely approach social reform cases as class actions; their orientation is to view individual grievances as stemming from systemic problems. Including the Student Advocacy Center as next friend helped to serve the interests of the Center in obtaining publicity and legitimacy.

Neither procedural tactic bore ultimately on the merits; Judge Joiner refused to certify the case as a class action, 451 F. Supp. at 1326, and dismissed the Student Advocacy Center as next friend, *id.* at 1335. Nonetheless, the lawyers' broader view of the problem prevailed: the court-ordered remedy required change in the entire approach of the King School toward all black-English-speaking children, rather than providing only the plaintiffs with relief. *See infra* pt. I C. More importantly, it seems clear that both procedural tactics had potential to detract from the apparent legitimacy of the plaintiffs' grievances, and certainly detracted from the main thrust of the complaint.

and issues without denying relief entirely, and, at the very least, diverted the energy of the lawyers and the attention of the court away from the most pressing concerns of the Green Road families.

B. Adjudication of the Dispute

From the beginning, a pattern of communication developed that may very well have affected the decisions and litigation positions taken by the defendant Ann Arbor School Board. Attorney John Weaver worked closely with the Superintendent of Schools, Harry Howard, in developing strategy—sometimes making decisions that Howard later approved, other times acting jointly with Howard. Oftentimes, Howard appeared to have authority to proceed without obtaining Board approval. Furthermore, even when the Board was more closely involved, it received its information in distilled form from Weaver and Howard, who sought ratification for tentative choices already made. With the exception of the decision not to appeal the trial court ruling,[45] the Board, not surprisingly, acquiesced in the course charted by Howard and Weaver. Thus, Howard and Weaver recommended opposing the lawsuit on the merits rather than negotiating a settlement, and the Board concurred.[46]

After denying preliminary injunctive relief and refusing to certify the case as a class action,[47] Judge Joiner acted on several of the defendant School Board's substantive challenges to the complaint. He dismissed all plaintiffs' claims, with the exception of the black English cause of action.[48] Moreover, he dismissed the

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45. *See infra* note 57 and accompanying text.

46. One might have expected the liberally-minded, excellent Ann Arbor school system to be responsive to the plaintiffs' request for solutions to a serious educational problem. Indeed, many members of the system—teachers, administrators, and School Board members—were sympathetic to the plaintiffs and would have preferred negotiation to defending on the merits. *See infra* Table C. Because the complaint came accompanied by a federal lawsuit, however, and included accusations of illegal conduct, most individuals within the defendant entity wanted to defend; thus, the minority position was suppressed.

47. 451 F. Supp. at 1326.

48. The first two claims alleged a deprivation of the schoolchildren's rights as protected by federal statutes, 42 U.S.C. §§ 1983, 1985(3) (1976), and a violation of their equal protection rights guaranteed by the fourteenth amendment, U.S. CONST. amend. XIV, § 1. The court, in rejecting these claims, distilled plaintiffs' theories into two components. First, plaintiffs were arguing a deprivation of the right to equal educational opportunity. But, as the court observed, the Supreme Court previously had held education not to be a fundamental right. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1972). Therefore, in order to establish their equal protection argument, plain-

Student Advocacy Center as "next friend" of the plaintiffs, recognizing the potential conflict of interest between the mothers and the Center in pressing the best interests of the schoolchildren.[49] Thus, all that remained of the original lawsuit was an individual action by fifteen children,[50] through their mothers, alleging that the Ann Arbor School Board's failure to take their black English "language barrier" into account in teaching them to read denied them equal educational opportunity. The major thrust of the suit had been turned aside.

The plaintiffs confronted a difficult choice: they could concentrate upon appealing the dismissal of their major causes of action, or could continue the litigation of the black English claim. Choices of goals and strategy for plaintiffs[51] were influenced by a

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tiffs had to demonstrate that the school system's decision not to provide remedial services to all arguably needy children bore no rational relationship to a legitimate state objective. Plaintiffs had not satisfied this difficult standard. 451 F. Supp. at 1327-28.

The second prong of the equal protection argument involved plaintiffs' argument that they were being stigmatized by being labeled as handicapped. Again, the court applied a rational relationship standard in upholding the school policy, because plaintiffs did not establish themselves as a suspect class. *Id.* at 1328.

After denying defendants' motion to dismiss the claim relating to black English, *see id.* at 1330-32, the court considered plaintiffs' fourth cause of action, which alleged a deprivation of federal benefits because an insufficient number of disadvantaged children attended the King School. The court concluded that a denial of benefits on this basis fell outside the scope of the federal statute forbidding discrimination in the administration of federal programs, 42 U.S.C. § 2000(d) (1976); thus, the allegation was facially insufficient to state a claim for relief. 451 F. Supp. at 1333.

The fifth claim advanced by the plaintiffs involved a pendent state-law claim that the King School had violated their right to a free education, as guaranteed both by state statute, M.C.L. § 380.1147(1) (1979), and by the Michigan Constitution, MICH. CONST. art. 8, § 2. The court dismissed this claim after recognizing that the Michigan equal protection provisions were intended to secure rights identical to those protected under the federal constitution and statutes, concluding that the Michigan courts would not likely be sympathetic to the claim advanced by the plaintiffs. 451 F. Supp. at 1334.

Finally, the court dismissed the sixth element of the plaintiffs' complaint, which alleged tortious violations of their constitutional rights by named defendants. Because all plaintiffs' constitutional arguments had been dismissed, any causes of action against specific officials for constitutional deprivations had clearly been eviscerated. *Id.* at 1334.

49. 451 F. Supp. at 1334-35. The court noted, however, that the Student Advocacy Center remained free to serve the plaintiffs in an advisory capacity. *Id.* at 1335.

50. The plaintiff groups decreased from 15 to 11 children during the course of the lawsuit, because 4 children moved out of the school district. 473 F. Supp. at 1373.

51. The theory underlying the advocacy system dictates that the attorney act as a neutral conduit to the court for the expressed views of the client. Thus, the attorney has no independent interest in the case; he must abide by the client's decisions regarding the appropriate course of action. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 5, 7 (1979). But an attorney often cannot realistically carry out this theoretical responsibility in a social reform case involving complex parties. *See* Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 885-86 (1978) [hereinafter cited as Project, *Institutional Reform*]. The advocate pursuing a social reform agenda may have interests different from the individuals being represented. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978); Gonzales v.

pattern of decisionmaking—mirroring the defendant's communications network—which had evolved among the various individuals in the plaintiffs' camp. Lawyers Kaimowitz and Lewis reached tentative decisions either by themselves or in tandem with Ruth Zweifler of the Student Advocacy Center.[52] Zweifler commonly presented these choices to the mothers, and sometimes the children, while at the same time presenting the advisors' views on the political and legal likelihood of success. The clients uniformly accepted the advice of their lawyers, friends, and allies.[53]

As a practical matter, therefore, Kaimowitz and Lewis were responsible for the choice between appealing the dismissal and pursuing the remaining claim. After consultation with linguistics experts,[54] the lawyers concluded that the black English claim, if vindicated on the merits, could realize the objectives originally envisioned by the lawsuit. The King School would be forced to confront the socioeconomic differences between black-English-speaking children and its other students, and to devise a plan for providing these children with more effective instruction. Moreover, winning the lawsuit, under *any* theory, was important for publicity purposes: the school would be exposed publicly for its failures in meeting the particular needs of poor black children. The lawyers determined that litigation of the sole remaining claim should continue; the Student Advocacy Center agreed, as did the Green Road parents.

Cassidy, 474 F.2d 67 (5th Cir. 1973). Furthermore, there may be vastly varying perceptions regarding the best interests of the group seeking social change. *See* Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class, and Representation*, 27 U.C.L.A. L. REV. 1067, 1112-14 (1980).

A single lawyer cannot simply channel a multifaceted interest array into a consistent litigation posture. *See* Fiss, *supra* note 1, at 21. To avoid equivocal advocacy, the lawyer must select a single position to present to the court; dissenting viewpoints within the complex party must be suppressed. Indeed, equivocal advocacy in response to a multitude of interests might violate the lawyer's obligation to represent a client zealously. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7. *See generally* Bell, *supra* note 10, at 493-505 (discussing the ethical problems arising in civil rights litigation).

52. Kaimowitz and Lewis had a natural affinity with Zwiefler. All three were involved in seeking systemic change, and had similar educational and social backgrounds. The Green Road families, in contrast, were interested mainly in their specific problems, not social reform, and differed from the lawyers both educationally and socially. Quite naturally, therefore, and quite typically, the Michigan Legal Services lawyers went first to the Student Advocacy Center before consulting with the plaintiffs.

53. *Cf.* Bell, *supra* note 10, at 477 n.21 (After receiving a "detailed exposition" from civil rights lawyers regarding the possibilities for a school desegregation suit, "it was hardly surprising that the black parents did not reject [the advice]. To put it kindly, they had not been exposed to an adversary discussion on the subject.").

54. The expert primarily involved was Dr. Geneva Smitherman, a linguistics professor at Wayne State University.

A well-publicized trial ensued in the summer of 1979.[55] Plaintiffs presented extensive testimony from linguistics experts, as well as from many of the Green Road parents and children, in addition to calling the principal and several teachers from the King School as adverse witnesses. John Weaver, counsel for the defendants, felt certain that the plaintifffs had failed to establish a legally sufficient case; should the district court find for the plaintiffs, he was confident that he could obtain a reversal on appeal. Furthermore, through cross-examination of the King School teachers and principal, Weaver felt he had established much of the School Board's defense. To emphasize his contention that the plaintiffs' case was inadequate, Weaver elected to rest without calling any witnesses. Superintendent Howard and the Board went along with their lawyer's choice.

Following Judge Joiner's finding for the plaintiffs on the black English claim,[56] however, Weaver's strategy suffered a fatal setback. An intervening election had altered the composition of the Ann Arbor School Board; the majority that favored fighting the litigation had dissolved. When Weaver sought approval of his decision to appeal the ruling, the School Board opted, for the first time, to reject the choice of its advisors[57] and accept the judgment of the district court that the Ann Arbor school system had abridged the rights of black-English-speaking children at the King School.

C. The Remedial Plan

Following the pattern seen frequently in social reform litiga-

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55. *See, e.g., Outcry over "Wuf Tickets"*, TIME, Aug. 20, 1979, at 61; *Black English Gets Its Day in Court*, U.S. NEWS & WORLD REP., July 9, 1979, at 42; N.Y. Times, July 13, 1979, at A8, col. 1; *id.*, Aug. 21, 1979, at C1, col. 1.

56. *See supra* notes 14-24 and accompanying text.

57. The events contributing to this decision not to appeal illustrate how advisors, by controlling the information used to evaluate their recommended decision, effectively control the outcome—a phenomenon particularly common among complex parties in social reform litigation. In executive session, acting upon the advice of Superintendent Howard and attorney Weaver, the School Board initially voted, by a slim 5-4 majority, in favor of appealing the district court ruling. Both advisors had significant incentives to seek an appeal; Howard likely perceived the district court holding as an indictment of his administration, while Weaver needed vindication of his decision to rest at trial without presenting a case-in-chief. The Board concluded subsequently, however, that it was legally required by Michigan's Open Meetings Act, M.C.L. §§ 15.261—.275 (1979), to take this vote at a public meeting. In the ensuing public session, persons sympathetic to the cause of the Green Road families, including plaintiffs' counsel, addressed the Board. After considering the information and arguments from another perspective, a single member changed sides, and the Board voted not to appeal the decision.

tion,[58] Judge Joiner ordered the defendant Ann Arbor School Board to submit its own plan devising relief for black-English-speaking children in the King School.[59] The plan submitted to the court by the Board,[60] actually developed by the school system administration, required King School teachers to receive twenty hours of formal instruction in black English, centered especially upon the problems involved in teaching reading to black-English-speaking children. Furthermore, the plan made provision for three or four follow-up seminars during the semester that would address application of the formal black English instruction to classroom situations.[61]

Plaintiffs objected to several features of the plan, primarily regarding the exclusion of the mothers and the Michigan Legal Services lawyers from any role in monitoring the plan's implementation. The court rejected changes suggested by the plaintiffs,[62] however, declining to alter the School Board's proposal because it was "rational in light of existing knowledge."[63] Thus, with the exception of a minor modification requiring that there be attempts to evaluate the success of the relief by assessing the improvement in the children's reading skills,[64] the court ap-

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58. *See* Chayes, *supra* note 26, at 1298 n.80 ("Often the court will ask the defendants to help draft the initial decree since they may be the only persons who can combine the needed technical background and detailed knowledge of the institution to be changed.").

59. 473 F. Supp. at 1383.

60. *Id.* at 1383-91.

61. *Id.* at 1385 n.1.

62. *See* Response on Behalf of Plaintiffs to an Educational Plan Submitted by Ann Arbor Board Evaluation [sic], Martin Luther King Junior Elementary School Children v. Ann Arbor School Dist. Bd., 473 F. Supp. 1371 (E.D. Mich. 1979); *see also* 473 F. Supp. at 1389.

63. 473 F. Supp. at 1389.

64. *See id.* at 1390. When it came time for the School Board to submit its report on the implementation of the court-ordered relief, attorney Weaver and Superintendent Howard apparently were determined to avoid the vagaries of the Board. *Cf. supra* note 57 (describing the Board's refusal to ratify the decision to appeal made by Weaver and Howard). They had prepared a report which served their interests: it found that the remedial plan had been implemented "in a good faith manner," Final Evaluation, King Elementary School Vernacular Black English Inservice Program, Summary of the Report, at 1 (1980) (on file with the *Journal of Law Reform*), and that it "reinforced and expanded generally existing teacher understanding and teaching strategies relative to the issues surrounding black vernacular English and [the problems of] learning to read in school," *id.* at 2. In other words, the program's effect had been only minimal—because the teachers already knew the problems and had solutions. This finding, of course, directly challenged the district court's conclusion that the King School had not addressed the problems of black-English-speaking schoolchildren; in effect, the school system had exonerated itself.

By agreement of Weaver and Howard, the report was to be filed without approval or input from the School Board. Some Board members were shocked that an evaluation report would be provided to the court without their knowledge or consent—particularly

proved the School Board's plan and ordered it into effect.[65]

II. RESISTANCE TO THE COURT-ORDERED REMEDY: AN EMPIRICAL STUDY

Social reform litigation often envisions restructuring a portion of society by inducing a change in bureaucratic behavior.[66] In *King*, for instance, the plaintiffs desired institutional change, seeking to readjust both the policies and attitudes of a public school administration.[67]

Yet such restructuring cannot be coerced by judicial fiat; the courts stand powerless to effect systemic change without a bureaucracy's voluntary compliance. For this reason, among others,[68] a defendant bureaucracy adjudged liable on the merits often will be entrusted with primary responsibility for developing a remedial plan. This approach, designed to minimize judicial intrusiveness while ensuring that the bureaucracy has a stake in the success of the plan it has created,[69] nevertheless may not eliminate resistance to court-ordered relief. Of necessity, in a bureaucracy composed of varying interests,[70] only the top administrators are likely to be intimately involved in formulating a remedial plan.[71] Therefore, those most directly affected by the remedy, and most involved in carrying it out—the lower levels of bureaucracies—are distanced from the litigation. This may well lead these individuals to resist the judicial decree, and certainly reduces their stake in the plan's success.[72] Because

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because the Board, not the Superintendent, was the party defendant. Perhaps the Board might have ordered additional study of the remedial program, or altered the language of the report. But another election had occurred since the decision not to appeal the trial court ruling, *see supra* note 57 and accompanying text, and the majority sympathetic to the plaintiffs had evaporated; the Board majority overrode the concerns of the minority group and agreed to the decision reached by Weaver and Howard to file the report with the court before showing it to the Board.

65. 473 F. Supp. at 1390-91.

66. *See* Chayes, *supra* note 26, at 1298-1301; Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 467-68 (1980); Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 U.C.L.A. L. REV. 244, 258 (1977). *See generally* Project, *Institutional Reform*, *supra* note 51, at 813-14.

67. *See supra* text accompanying notes 34-35.

68. *See supra* note 58.

69. *See* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 437-40 (1977).

70. *See* Yeazell, *supra* note 51, at 1112-14.

71. *See supra* notes 59-61 and accompanying text.

72. *See* Yeazell, *supra* note 66, at 256-60.

these actors are critical to the implementation of a remedial plan, their disaffection with the process and consequent resistance to court-ordered remedies should be of vital concern to those who perceive the courts as vehicles for social reform.[73]

A. Overview of the Study

A consideration of the specific responses to the relief ordered in *King* may yield valuable insights into the general problem of bureaucratic opposition to judicially mandated changes in institutional behavior. Toward this end, I undertook a survey of the perceptions of the defendant group in *King*,[74] with special emphasis upon the King School teachers, the group most responsible for effectuating—and most able to vitiate—the court's remedial plan.

The survey hypothesized that individuals within the bureaucracy resist court-ordered relief under two circumstances: when

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73. There are many who question whether courts should be involved in social reform. *See, e.g.*, Ely, *The Supreme Court, 1977 Term—Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Others find social reform litigation to be justified by historical considerations and political necessity. *See, e.g.*, Potts v. Flax, 313 F.2d 284 (5th Cir. 1963); United States v. Michigan, 460 F. Supp. 637 (W.D. Mich. 1978); Eisenberg & Yeazell, *supra* note 66; Fiss, *supra* note 1; Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979); Yeazell, *From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation*, 27 U.C.L.A. L. REV. 514 (1980); Yeazell, *supra* note 51; Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977). This Article does not enter that debate, but simply assumes that courts will continue their involvement in broad social reform questions, and so offers suggestions for improvements in the process.

74. In the fall of 1980, nearly a year after the King School teachers had received their special instruction in black English, *see supra* notes 60-61 and accompanying text, questionnaires were mailed to each of the 56 individual members of the defendant entity who could be identified. These consisted of 14 School Board members who had served at some time during the 3 years the suit was pending, 6 school system administrators who were involved significantly in the case, the principal and 34 staff members and teachers of the King School, and a representative of the teachers' union who had been active in the case. Fifty of the 56 questionnaires were delivered; of those, 25 were completed and returned, for an overall 50% return rate. The principal, the teachers' union representative, and all 5 administrators responded to their questionnaires. Half of the 12 questionnaires delivered to School Board members were returned, but only 39% (12 of 31) of the teachers who received questionnaires responded.

Based on discussions with teachers and others connected with the case, I suspect the low teacher-response rate reflects in large part their bitterness over the situation. They felt wrongfully accused by the plaintiffs and betrayed by the administrators and the School Board. Rather than reflecting apathy, therefore, the low response rate among the teachers likely indicates even deeper dissatisfaction than shown in the actual responses. *See infra* Table A and accompanying text.

they perceive the judicial process to be illegitimate or unfair,[75] and when they disagree with the substantive result in the case.[76] The judicial process could certainly eliminate resistance to its remedies by finding for the defendant bureaucracy on the merits; there would be no bureaucratic opposition without an injunction. Quite clearly, however, the system cannot abdicate its responsibility to protect individuals from illegal conduct.[77] Emphasis must be placed, therefore, upon minimizing bureaucratic resistance without regard to outcome. Underlying this approach is the belief that people will be more likely to adhere to a result, even if unfavorable to them, when they perceive the legal process as procedurally fair.[78]

Thus, the survey attempted to identify the sources of perceived procedural unfairness that might have fostered resistance to the court's order in *King*. From the analysis of the litigation process based upon interviews with the participants, questions regarding interest representation appeared to be crucial. To the extent the defendant group in general, and the teachers in particular, felt their own interests — or indeed, those of others—were not represented adequately in the judicial process, presumably they would be less likely to obey a court order with which they disagreed.

B. Presentation of Findings

As a threshold matter, the survey inquired into the extent of

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75. *See* Chayes, *supra* note 26, at 1299; Walker, Lind & Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1415-16 (1979); Yeazell, *supra* note 66, at 257-58.

76. Indeed, much of the scholarly criticism of judicial involvement in social reform can be traced to this same source. *See* Eisenberg & Yeazell, *supra* note 66, at 514-15.

77. *See* United States v. Michigan, 460 F. Supp. 637, 639 (W.D. Mich. 1978); Higgenbotham, *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134, 138 (1976); Neuborne, *supra* note 7, at 1127-28; Satter, *Changing Roles of Courts and Legislatures*, 11 CONN. L. REV. 230, 240-46 (1979).

78. This assumption draws support from an earlier study on the public perception of legal institutions. *See* Engstrom & Giles, *Expectations and Images: A Note on Diffuse Support for Legal Institutions*, 6 LAW & SOC. REV. 631 (1972). In that survey, 65% of the respondents endorsed a "procedural fairness norm"—that they would consider a decision to be fair if arrived at through fair procedures, without regard to the specific outcome—while only 20% disagreed. *Id.* at 633. The respondents also reported a significantly greater willingness to obey a decision they strongly disagreed with, so long as the court used fair procedures. *Id.* at 635.

Other research has demonstrated that people assess the legitimacy of the judicial system both by whether they agree with the substantive result and by the fairness of the method used to reach that result. *See* Barkun, *Law and Social Revolution: Millenarianism and the Legal System*, 6 LAW & SOC. REV. 113 (1971).

dissatisfaction among the defendant group with the result in *King*, and into the extent of resistance to the court-ordered remedy. The first response, presented in Table A, indicated substantial discontent with the district court ruling, particularly among the teachers.

TABLE A
REACTION TO: "I WAS SATISFIED WITH THE RESULT IN THE CASE."

	Strongly Agree	*Agree*	*Disagree*	*Strongly Disagree*
Total defendant group	0	7	3	14
Teachers only	0	1	1	10

In contrast, however, Table B shows that the defendant group did not report great resistance on their part to the relief ordered by the court, despite their substantial dissatisfaction with the holding.

TABLE B
RESPONSE TO: "HOW WOULD YOU CHARACTERIZE YOUR PARTICIPATION IN THE TRAINING PROGRAM?"

	Eager	*Willing*	*Reluctant*	*Involuntary*
Total defendant group	2	8	3	1
Teachers only	1	6	3	1

Nonetheless, notwithstanding the general lukewarm willingness to abide by the court order, four of eleven teachers responding[79] did not willingly participate in the training program—and it seems likely that there was more resistance in fact than the questionnaires revealed.[80]

After addressing these threshold questions, the survey ex-

79. The number of responses to a particular question do not always equal the total number of persons responding to the questionnaire; some respondents did not answer every question.

80. From newspaper reports and from my conversations with teachers and others involved in the black English case, I am certain there was serious passive resistance to the court-ordered relief that the questionnaires did not reveal. Most teachers were willing to attend the training sessions, but the sessions were resented and perceived as unnecessary. Teachers harboring these sentiments likely did not fully absorb the lessons of the remedial program.

plored the potential conflicts of interest within the defendant group during the liability stage of the litigation. Three major decisions regarding outcome goals and strategy choices raised potential conflicts among the multiple interests of the defendant group. As detailed in Table C, the questionnaire asked the defendant group whether they felt the court should find for the plaintiffs on the question of liability, whether the main objective of the defendant's lawyer should have been a compromise settlement agreement or a defense on the merits, and whether the School Board should have appealed the district court ruling.[81]

TABLE C

RESPONSE TO: "DID YOU WANT THE COURT TO FIND FOR PLAINTIFFS OR DEFENDANTS?"

	Plaintiff	*Defendant*
Total defendant group	7	15
Teachers only	2	9

RESPONSE TO: "SHOULD THE MAIN GOAL OF THE DEFENSE LAWYERS HAVE BEEN TO DEFEND OR TO SETTLE?"

	Settle	*Defend*
Total defendant group	7	16
Teachers only	2	9

RESPONSE TO: "DID YOU WANT THE SCHOOL BOARD TO APPEAL?"

	No	*Yes*
Total defendant group	9	13
Teachers only	1	7

Although, not surprisingly, a majority felt that the school system should have been vindicated on the merits, a sizeable minority wanted the court to find for the plaintiffs. Similarly, a substantial portion of the defendant group would have settled the lawsuit rather than going to trial. This represents a significant conflict of interest; defense counsel's representation of the majority view at the liability stage evidently necessitated the suppression of strong opposing sentiment.

This conflict of interest among the defendant group was even more dramatic regarding the question of whether the district

81. *See supra* pt. I B.

court decision should have been appealed. A preponderance of the defendant group—including an overwhelming majority of teachers—desired an appeal of the district court's ruling. The decision of a narrow majority of the School Board not to appeal, however, was legally binding.[82] The suppression of this dissenting interest may have left those involved in effectuating the court-ordered relief with the impression that the legal process had not been procedurally fair.

The questions concerning conflict of interest at the relief stage were more complex, reflecting the greater complexity of the decisions and interests involved. The questionnaire presented a choice among two options for each of eight facets of the court's remedial plan: one based upon the plan formulated by the defendants and accepted by the court;[83] the other embodying suggestions and objections made by the plaintiffs to the defendants' plan.[84] Table D presents the results; surprisingly, the defendant group as a whole strongly preferred plaintiffs' suggestions rather than the plan actually enacted for two of the eight features tested, while the teachers strongly favored an additional third facet of the plan advanced by the plaintiffs. Both the teachers and the total defendant group strongly favored three features of the enacted plan over the plaintiffs' suggestions, while reaction to the other features tested was equivocal.

TABLE D
RESPONSES REGARDING SPECIFIC FEATURES OF THE REMEDIAL PLAN

	Plaintiffs' Version	*Defendant's Version*
Consultation with parents[85]		
Total defendant group	15*	4
Teachers only	7*	3
Consultation between teachers and language arts consultant[86]		
Total defendant group	14*	5
Teachers only	6*	3

(* indicates clear majority)

82. *See supra* note 57 and accompanying text.

83. *See supra* notes 60-61 and accompanying text.

84. *See supra* note 62 and accompanying text. The questionnaire did not indicate that the options were based upon either the defendants' or plaintiffs' remedial plans.

85. The plaintiffs proposed that there be regular consultation between the school and the parents; the defendants' plan did not provide for such consultation.

86. The plan proposed by the defendants called for consultation between the teachers and the language arts consultant at the teacher's request; the plaintiffs sought regularly scheduled consultations.

TABLE D—*Continued*

	Plaintiffs' Version	*Defendant's Version*
Materials selection[87]		
Total defendant group	4	10*
Teachers only	2	6*
Help plaintiffs in class or out of class[88]		
Total defendant group	5	9*
Teachers only	2	6*
Composition of plan management team[89]		
Total defendant group	9	10
Teachers only	5	5
Parents' attendance at management team meetings[90]		
Total defendant group	8	10
Teachers only	4	5
Appointment of consultant[91]		
Total defendant group	7	15*
Teachers only	4	6*
Focus of evaluation program[92]		
Total defendant group	11	10
Teachers only	8*	1

(* indicates clear majority)

Again, apparently a very sizeable conflicting interest among the defendant group was suppressed—this time in the process of drafting a remedial program. It seems probable that the administration did not intentionally muffle the conflicting views of the

87. The plaintiffs wanted the language arts consultant to select teaching materials, while the court-enacted plan called for the teachers to select materials.

88. Plaintiffs proposed that the children be given special help only in their regular class; defendants' plan allowed children to be removed from their classroom for such special help.

89. Plaintiffs proposed that they be able to select 2 of the 12 members of the Supervision and Management Team; defendants' plan provided that the supervision team would be appointed exclusively by the school system administration.

90. The plan formulated by the defendants did not allow plaintiffs' parents to attend the Supervision and Management Team meetings; plaintiffs wanted these meetings to be open to the parents.

91. The plaintiffs proposed that the appointment of the external expert consultant in linguistics be by agreement of the parties; defendants' plan allowed the school administration to act alone in making this appointment.

92. The plaintiffs felt that evaluation of the program should focus primarily on the child; defendants' plan provided that evaluation would concentrate upon the teachers.

teachers or others in the defendant group regarding the elements of the remedial plan; rather, the views of the individuals within the defendant entity were not solicited and were therefore unknown.

While the questionnaire thus exposed various conflicts of interest between the defendant group and the positions asserted by defense counsel, the more important questions bear on the actors' perception of procedural unfairness. For purposes of identifying the sources of resistance to court-ordered remedies, the critical inquiry must be whether those responsible for implementing the relief sensed these conflicts and the consequent suppression of interests. Therefore, the survey asked the defendant group whether they had any views or positions that were not advanced by the lawyers, either at the liability or remedy stages of the litigation. As indicated in Table E, the defendant group had an extremely strong perception that their views and positions at the liability phase were not fully communicated to the court.

TABLE E

RESPONSE TO: "DID YOU HAVE ANY VIEWS NOT PRESENTED BY THE LAWYERS?"

	Yes	*No*
At the liability phase		
Total defendant group	18	3
Teachers only	9	1
At the remedy phase		
Total defendant group	7	16
Teachers only	3	8

This perceived inadequacy may relate to tactical choices or misconceptions as to legally material arguments, and might well have been eliminated by greater interaction between the defendant group and their counsel—even if the actual choice of tactics did not change.[93]

93. As noted previously, *see supra* text accompanying notes 81-82, defense counsel represented the views of the majority of the defendant entity regarding two major tactical choices in the litigation, and suppressed the dominant view only when obligated by the legally binding decision of the School Board not to appeal the district court ruling. As an ethical matter, the attorney likely could not have acted otherwise. *See supra* note 51. Dissenting individuals, however, might have intervened to press their position, *see, e.g.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), or, alternatively, plaintiffs' counsel

In contrast, as set forth in Table E, the defendant group did not perceive such significant flaws in representation of their interests at the relief stage. This seemingly conflicts with the findings reported in Table D that the remedial plan proposed by defense counsel and implemented by the court actually contained several provisions supported by only a minority of the defendant group.

This discrepancy resulted apparently because the defendant group was not well informed regarding the proposed features of the remedial plan, or of plaintiffs' counterproposals, and so was unaware that its interests were being suppressed.[94] Though uninformed individuals may not resist the remedial plan on the grounds that their interests were suppressed, they cannot be expected to support it fully. Their stake in the plan's success would have been greater had they been advised of the proposed program for relief and been given an opportunity to inject their various viewpoints.

Pursuing the issue of procedural unfairness, the survey next explored perceptions about whose interests had been principally represented before the court. The results, presented in Table F, indicate a strong sense among the defendant group that defense counsel had advanced primarily the interests of the school administration, particularly at the relief stage. Similarly, Table G details the perceptions of the defendant group concerning the plaintiffs' interest advocacy. The belief of individual members of the defendant entity that the plaintiffs were inadequately represented, whether or not accurate, would contribute to their as-

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could have represented their view, *see, e.g.*, Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969). On the other hand, because members of the defendant school system would be required to participate in any plan the School Board chose to implement, regardless of a court order, they might have lacked a legally cognizable interest sufficient to justify intervention. *See* Yeazell, *supra* note 66, at 252-55.

94. This conclusion draws support from the responses to the questionnaire. Eight of 22 respondents among the defendant group indicated that they had no disagreement with the remedial plan as a whole. When asked to choose between plaintiffs' and defendants' versions on eight specific features of the plan, however, each of those eight respondents preferred the plaintiffs' proposal for at least one feature, and two chose the plaintiffs' version for as many as five facets of the remedial plan. This appears to indicate that the defendant group had, at best, only limited knowledge of the program formulated by defense counsel and ultimately accepted by the court.

sessment of the fairness of the judicial process.

TABLE F
RESPONSE TO: "OF THE FOLLOWING GROUPS, WHOSE POSITION DID THE DEFENSE LAWYERS PRIMARILY REPRESENT?"

	Responses by: *Total defendant group*	*Teachers only*
At the liability phase		
School Board	4	1
Administration	14	6
Teachers	7	3
Defense lawyers	5	2
At the remedy phase		
School Board	5	3
Administration	14	6
Teachers	4	1
Defense lawyers	4	0

TABLE G
RESPONSE TO: "OF THE FOLLOWING GROUPS, WHOSE POSITION DID THE PLAINTIFFS' LAWYERS PRIMARILY REPRESENT?"

	Responses by: *Total defendant group*	*Teachers only*
At the liability phase		
Plaintiff children	2	0
Plaintiffs' parents	2	0
Student Advocacy Center	16	9
Plaintiffs' lawyers	11	5
At the remedy phase		
Plaintiff children	3	1
Plaintiffs' parents	5	0
Student Advocacy Center	13	7
Plaintiffs' lawyers	10	6

The defendant group identified the Student Advocacy Center as having the greatest influence upon the litigation at both the liability and relief stages, with the lawyers' own interests running a close second. This perception of the plaintiffs' representation, combined with the defendant group's opinion of its own representation, evinces a jaundiced view of the legitimacy of the judicial process. The appearance of procedural unfairness is

manifest; the defendant group perceived neither the actors most directly responsible for implementing the court-ordered relief, nor the actors for whom the relief purportedly was ordered, as the primary protagonists in the litigation.

C. *Reducing Bureaucratic Resistance to Judicially Mandated Relief*

Dissatisfaction and resistance to court orders implementing social reform flow not only from the result of a particular adjudication, but also from the process by which the decision is reached. The legal system can manipulate outcomes to avert discontent only to a limited extent.[95] If litigation seeking institutional change is to be maximally effective, however, courts should modify their processes in order to generate support and voluntary compliance.[96]

The main procedural deficiency in social reform litigation identified by this study is that the lower levels of the bureaucracy are excluded from active participation in the lawsuit. Although this exclusion may superficially seem appropriate for reasons of economy, the apparently inexorable result—as demonstrated in *King*—is that those ultimately responsible for effectuating a court order requiring institutional change will resist that order because they feel uninvolved and unrepresented in the process.

As an initial response, courts should encourage counsel for

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95. The court should certainly ignore the defendant group's desires, though not their legal arguments, concerning liability. *See supra* note 77 and accompanying text. Professor Yeazell argues that the desires of the injured group seeking reform should be disregarded as well, so that the judge would fashion a remedy solely with reference to the policies underlying the substantive law. *See* Yeazell, *supra* note 51, at 115-19. Yet, while admittedly the relief granted in litigation seeking institutional change should advance substantive policy aims, and not merely "some tangentially related goal of the parties," *id.* at 1118, the courts should nonetheless be reluctant to slight the interests of the injured group at the relief stage. It is tempting to mistake traditional remedies for the only proper remedies; such is the received tradition in which the remedy "flow[s] ineluctably" from the liability determination, *see* Chayes, *supra* note 26, at 1282-83, 1293-94. Oftentimes, there may exist equally legitimate alternative methods to effectuate substantive rights—and the injured may well be more likely than the judge to understand the most efficient means to achieve the desired end. My proposal envisions a dialogue between the court and the parties on the appropriate scope and method of relief, that could utilize the insights of the parties without sacrificing substantive policy aims.

96. For an expanded analysis of philosophical principles underlying the adversary process that lead to the suppression of interests within complex parties affected by social reform litigation, as well as a proposed new theory of interest analysis and advocacy, see Wilton, *Functional Interest Advocacy in Modern Complex Litigation*, 60 WASH. U.L.Q. 37 (1982).

complex institutional entities to consider the "client" as comprised of individuals from all levels of the bureaucracy. This would mean, therefore, that even lower level actors would be kept apprised of the lawsuit and would be solicited for their views on litigation goals and strategy.[97] Such interaction between counsel and the defendant group can be achieved either by informal suggestions or formal court orders. Thus, in *King*, Judge Joiner might easily have required the School Board to include the teachers in the process of formulating a proposed remedial plan for the court's scrutiny.

Counsel cannot be relied upon, however, to be entirely candid in presenting the interests of all the members of the bureaucracy. When the King School teachers favor a position different from an option endorsed by the School Board,[98] for example, the lawyer must vigorously advocate the interests of the Board—even at the expense of suppressing the teachers' viewpoint. Therefore, the court itself often must solicit the views of groups such as the teachers in *King*.[99] When the court seeks the viewpoints of lower levels of bureaucracies,[100] not only does the

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97. *Cf.* Gulf Oil Co. v. Bernard, 452 US. 89 (1981) (communication between counsel and the class notifies class members of the lawsuit, enabling them to make strategic choices and to contribute factual information on the merits of the litigation; such communication cannot be prohibited absent a finding of potential abuse).

98. *See, e.g., supra* Tables C & D.

99. Courts should solicit rather than surmise the viewpoints of the defendant group; frequently, courts may err in their assumptions regarding a group's preferences in litigation strategy. In Ward v. Luttrell, 292 F. Supp. 165 (E.D. La. 1968), for example, the court refused to certify a class of working women seeking to challenge the constitutionality of laws restricting women from working certain hours or under certain conditions, baldly asserting that many working women would not want to forego the "protection" provided by those laws. *See id.* at 168. Similarly, in *King*, the support among the teachers for the plaintiffs' position on liability might not have been expected, although it was revealed by the survey, *see supra* Table C. Furthermore, the teachers would be presumed to support the Superintendent's remedial plan, rather than the plaintiffs' counterproposals, yet the questionnaire responses were to the contrary on several facets of the proposed relief, *see supra* Table D.

Moreover, even aside from the question of whether the court can accurately discern the opinions of a complex party, participation in the process is a goal to be fostered in itself. Because subjective satisfaction of actors such as the King School teachers must be one major objective of a court enmeshed in social reform ligitation, *see supra* notes 72-73, 75-78 and accompanying text, having the teachers express their own views to the court represents the most effective way to involve them personally in the adjudication and thus increase their perception of procedural fairness, *see* Yeazell, *supra* note 66, at 256-59.

100. The precise mechanism to be employed for achieving greater participation among the defendant group must be tailored to the problems of the individual case. *See generally* Project, *Institutional Reform*, *supra* note 51, at 909-27. In most cases, two commonly used devices would provide the court with a ready means for soliciting diverse viewpoints. First, the court could periodically distribute a sampling notice when confronted with new issues in the litigation, which would describe the alternatives under

remedy become more effective because of the increased perception of procedural fairness,[101] but also the quality of relief increases because the court becomes more fully cognizant of information and viewpoints that may be important to the final result.[102]

CONCLUSION

Courts involved in social reform litigation cannot ignore the dissatisfaction and resistance generated by their orders for institutional change, or such sentiments may undermine the legitimacy of the judicial process. At one level, discontent with judicial involvement in social reform cases may reflect a sense that such litigation tends to reflect the interests of reform-oriented organizations and attorneys, rather than the desires of the putative parties in interest. Indeed, in *King*, the ultimate resolution of the litigation spanned far beyond the concerns and desires expressed initially by the parents and schoolchildren involved in the case.

At another level, the process by which decisions are reached in social reform cases may itself engender resistance to judicial activism. For too long, the legal system has treated complex bureaucratic defendants in lawsuits seeking institutional reform as homogeneous entities having unified purposes and interests. Although this approach may be a justifiable simplification when the issues at stake do not concern all levels of the bureaucracy, its flaws become apparent in litigation aimed at obtaining changes in institutional operations. As exemplified by *King*, conflicting views among the defendant group—especially among

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consideration and invite response. *See generally* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1793 (1972); MANUAL FOR COMPLEX LITIGATION pt. I § 1.45 (4th ed. 1977); Project, *Institutional Reform*, *supra* note 51, at 881-83. The results of the sampling should be made available to all parties and the court, which could encourage follow-up investigation by counsel.

Second, the court could canvass the opinions of the defendant group by holding open hearings after giving notice of the questions under consideration. Those potentially affected by the litigation would have the opportunity to present their views in a public hearing—representing but a small extension of the conception of litigation as a "town meeting" enunciated in Yeazell, *supra* note 66, at 256-59. *See also* Project, *Institutional Reform*, *supra* note 51, at 908. Ideally, these hearings would not be subject to evidentiary rules, which could constrain participation. Because legally inadmissible information might be produced, as in discovery proceedings, it may be preferable in some instances for a master to preside who would summarize the relevant information for the judge.

101. *See supra* note 78 and accompanying text.

102. *See* Note, *supra* note 69, at 439-40.

those actors in the lowest levels of the bureaucracy, most directly responsible for ultimately implementing a remedial plan—will almost inevitably be suppressed to some extent. This suppression of views causes dissatisfaction within the bureaucracy; those distanced from the litigation may well view the legal system as procedurally unfair, and thus may resist court-ordered alterations in institutional policy.

Courts should minimize this resistance and focus their remedies more directly on the real grievances of the parties by encouraging those who will be affected by the case to participate actively in the litigation. Careful consideration of the interests and concerns of those individuals critically important to the success of a remedial order will greatly enhance the legitimacy and effectiveness of judicial involvement in social reform.